

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 12, 2008

WILLIAM L. VAUGHN v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2001-D-1990 Monte D. Watkins, Judge

No. M2008-00193-CCA-R3-PC - Filed June 17, 2009

The Petitioner, William L. Vaughn, appeals pro se the denial of post-conviction relief in the Criminal Court for Davidson County from his two convictions for aggravated sexual battery. The Petitioner entered two pleas of nolo contendere and received two consecutive sentences of ten years' incarceration to be served at one hundred percent, for an effective twenty-year sentence. On appeal, the Petitioner contends that: (1) the trial court erred in finding he had not proven that he received the ineffective assistance of counsel and that his nolo contendere pleas were unknowingly and involuntarily entered; (2) the trial court erred and abused its discretion in its fact-finding process; (3) the trial court erred by not allowing him to raise an ineffective assistance of counsel claim for his preliminary hearing counsel; (4) the trial court erred in not allowing him to raise an ineffective assistance of counsel claim for his appellate counsel; (5) the trial court erred in its findings of fact and conclusions of law "on the particular issues it chose to address and consider in its order denying relief"; (6) the trial court erred in identifying issues raised by the appellant but in not making findings regarding these issues or considering them in its order; and (7) the trial court erred in "not making proper findings of fact and conclusions of law, or identifying, addressing, or considering, in its determination of relief the other issues" the Petitioner claims he presented. We affirm in part and reverse in part the trial court's denial of relief, and we remand for a hearing on the ineffective assistance of counsel issues that the trial court refused to consider but were raised in the pleadings: the ineffective assistance of preliminary hearing counsel, the ineffective assistance of appellate counsel, and the ineffective assistance of trial counsel at the sentencing hearing on matters other than the Petitioner's claim of a closed sentencing hearing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in part,
Reversed in part and Case Remanded**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

William L. Vaughn, Wartburg, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Senior Counsel; Victor S. Johnson, III, District Attorney General; and Roger D. Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner entered nolo contendere pleas to two counts of aggravated sexual battery of two ten-year-old girls. This court affirmed the Petitioner's consecutive sentences on appeal, where the Petitioner challenged the sentences' lengths and imposition of consecutive sentences. State v. William L. Vaughn, No. M2002-01879-CCA-R3-CD, Davidson County, slip op. (Tenn. Crim. App. Aug. 1, 2003). We take the following facts from that opinion.

On September 7, 2001, ten-year-old A.V. and her sister spent the night with the defendant's stepchildren. The proof indicated A.V.'s family lived next door, and A.V. and the defendant's ten-year-old stepdaughter, L.O., were best friends. As the children slept on the floor, the defendant awakened A.V. when he rubbed his penis on her face. The next morning, A.V. recounted the incident to L.O. and the defendant's wife, L.O.'s mother. When the police questioned the defendant, he admitted that he unfastened A.V.'s pants, touched her underwear, and rubbed his penis on her face. Further, he confessed to performing similar acts upon L.O. "probably at least twenty times." He stated he had touched L.O.'s vagina through her underwear, rubbed his penis on her face, and placed his penis in her hand while she was asleep. The defendant told the police the abuse began when the family was living in Texas, where he also attempted intercourse with L.O. According to his recorded statement, "three or four" of the incidents occurred in Tennessee.

Id., slip op. at 1.

The trial court granted the Petitioner's motion to proceed pro se in the post-conviction proceeding. The trial court noted the Petitioner had had six attorneys during his direct appeal and post-conviction proceedings. It also released from the Petitioner's subpoenas, over the Petitioner's protest, a victim, the sentencing judge, and two attorneys who had previously been appointed for the Petitioner's post-conviction proceedings.

At the post-conviction hearing, trial counsel testified that he had been a practicing attorney since 1994. He said the Petitioner had been charged with nine counts of aggravated sexual battery. He stated that the Petitioner had rejected an initial plea offer of two concurrent ten- or twelve-year sentences "to serve" and that the Petitioner had wanted a range to be part of the plea agreement, thinking that he could perhaps receive a sentence toward the lower end of the range. He said the Petitioner's plea was not an "open" plea because the Petitioner was only facing a range from eight

to twelve years for each count and the total sentence was limited to twenty years. He said he advised the Petitioner to accept the first plea offer, the “flat offer without the exposure of a sentencing hearing,” because in trial counsel’s experience, the sentencing judge would impose the maximum sentence possible. Trial counsel stated that this was in fact what had occurred at the sentencing hearing. He said he argued at the sentencing hearing that the State did not have proof of psychological or physical harm to the child, a factor the trial court found applicable and upon which it imposed consecutive sentences.

Trial counsel testified that he filed a motion to suppress the Petitioner’s confession because he knew the Petitioner had been depressed and suicidal at the time of his confession. Referring to the Petitioner’s transcripts, he said they did not have a hearing on the suppression motion, which he said had a strong basis, because the withdrawal of the suppression motion had been consideration for the plea agreement. He said the plea offer had three benefits. He stated that by withdrawing the motion and accepting the plea offer to plead nolo contendere to two counts of aggravated sexual battery, the Petitioner received in return (1) the State’s dismissal of seven charges of aggravated sexual battery, (2) the State’s promise not to refer the cases for prosecution in Texas, where the Petitioner said in his confession that some of the offenses had occurred, and (3) a limitation to his exposure to further prosecution. He stated that even if the motion had been heard and granted, the Petitioner would have had to contend with the victims’ and witnesses’ testimony at trial. In other words, he said the granting of the suppression motion would not have eliminated the evidence against the Petitioner that could have been presented at trial. He agreed with the Petitioner that the State’s dropping the charges in seven counts was an inducement to accept the plea offer. He said the plea was not a “blind plea.” He also stated that the Petitioner had rejected another plea offer with a service time of less than sixteen years.

Trial counsel testified that he never spoke to the Petitioner’s daughter and the other victim, although he said he spoke with the Petitioner’s wife and the mother of the other child. He said the Petitioner’s wife told him that the Petitioner had drunk rum in the garage, that his daughter had had a neighbor spend the night, and that he had touched both girls. He said she told him what the victim had told her. He said that if they had taken the case to trial, he would have tried to speak with the two child victims, although he also noted he could have spoken with them only if they had permitted him to do so. Trial counsel said he did not think a trial date had been set. He said he did not interview the police officers involved in the case because, in his experience, they did not want to talk to defense attorneys about a case.

While acknowledging that he could not remember if a psycho-sexual evaluation pursuant to Tennessee Code Annotated section 39-13-705 (1997 & Supp. 1998) had been performed, counsel stated that it was his normal practice to have one performed in sex cases. When the Petitioner read a section from the plea hearing transcript reflecting that one had not yet been performed, trial counsel agreed that must have been an accurate statement. He said he thought perhaps they had waived the evaluation at the sentencing hearing. While acknowledging that the evaluation might have helped the Petitioner’s case, he said that the issue he argued at the sentencing hearing had been consecutive or concurrent sentencing and that the evaluation had been irrelevant to that. He said that if a client

insisted on being evaluated, he would move to continue the sentencing hearing for the evaluation to be performed. He also stated that he thought the absence of the evaluation had no effect on the trial court's determination. He said the psycho-sexual evaluation was not a condition of the plea agreement. The trial court took judicial notice of the fact that a psycho-sexual evaluation should have been performed pursuant to Code section 39-13-705. Trial counsel said that although he knew the State was seeking imposition of consecutive sentences, he did not file any documents addressing consecutive sentencing because he did not want the State to know ahead of time that trial counsel would argue that there was no proof of physical or psychological harm to the victims.

Trial counsel testified that he thought he would have read the arrest warrant before the preliminary hearing. He said he and the Petitioner discussed the Petitioner's confession on the plea date. He said the Petitioner both asked him questions about the statements and maintained that the statements were involuntarily given. Counsel said he believed the Petitioner, saying the Petitioner's state of mind made him more susceptible to pressure from the police. He said he did not think he told the Petitioner that the State would use the Petitioner's confession as the basis for the plea.

Trial counsel said the indictments were not multiplicitous because the counts alleged different acts. He did not remember if he had filed a bill of particulars in the Petitioner's case but stated that it was his practice to do so. He said he did not rely on the bill of particulars as a discovery tool. He said that it instead put him and the client on notice of the date of the offenses. He said it was not necessary to obtain a response to the motion for a bill of particulars before giving the Petitioner legal advice on whether he should accept a plea offer. He said he did not tell the Petitioner that the sentencing hearing was a "closed" hearing given that the victims were children.

Trial counsel said the Petitioner did not admit guilt at the plea. He said he and the Petitioner discussed the fact that his convictions could be used to enhance later sentences. He said it was his practice to have all clients read their plea agreements and to initial each paragraph confirming their reading of it. He said the Petitioner's initials were beside the paragraphs. Counsel stated he would not have presented the plea agreement to the court if counsel had not thought the Petitioner had made a knowing decision. He said he informed the Petitioner before the plea hearing that the sentence was to be served at one hundred percent. He stated that the trial court went over the terms of the plea agreement with the Petitioner but that the trial court did not "spell it out" that the Petitioner would have to register for the duration of his life with the sexual offender registry. He said the court informed the Petitioner of the need to register upon release. He said the Petitioner had a good understanding of the nature of the charges. Counsel then stated that the record presented to him by the Petitioner during the post-conviction hearing contained the answer to his motion for a bill of particulars and that they reviewed this document while discussing the plea offer the day of the plea hearing. He said that his practice was to show all documents and filings in a case to his client. He acknowledged that the materials presented by the Petitioner at the post-conviction hearing only addressed one count of the indictment. He said he could not remember if the State answered relative to the other counts.

Trial counsel testified that he did not review lesser included offenses when discussing the plea agreement with the Petitioner. He said he also did not think the trial court explained that if the Petitioner had proceeded to trial, he could have been convicted of a lesser included offense of aggravated sexual battery. He said that the prosecutor and he spoke the day of the plea hearing and that the prosecutor told him that if the Petitioner did not accept the plea offer, the State would refer the child rape cases to Texas for prosecution. He said he told the Petitioner about the gravity of the Texas prosecutions in that the Petitioner would face child rape charges, a more severe charge, and a jury would sentence him.

On cross-examination, counsel testified that he had explained to the Petitioner the sentence range he faced. He said the Petitioner initialed the plea agreement, and he agreed that the Petitioner knew what he was reading. He said the Petitioner said he had read the document. Counsel said that in his opinion, the Petitioner knowingly and voluntarily entered his pleas. He said he had not used threats or coercion to obtain the Petitioner's pleas. He said he did tell the Petitioner that if he did not accept the pleas, he could be indicted in Texas and that if he accepted the pleas, seven of the nine charges would be dropped and he would not be referred for prosecution in Texas. He said he had been a practicing attorney for eight years at the time of the pleas. He said he had complete discovery and thought the next-door neighbor was a strong witness against the Petitioner. He said that when the trial court asked the Petitioner if he knew what he was doing by entering his pleas, the Petitioner answered affirmatively. He said the trial court told him that he could have a jury trial at which his counsel would cross-examine witnesses against him. He said he and the Petitioner discussed the Petitioner's right to testify at trial and the use of his confession against him. He said he left it to the Petitioner to decide to accept or reject the offers. In trial counsel's opinion, the Petitioner would have obtained a better outcome by accepting the first plea offer rather than the one he accepted, but he stated that the Petitioner "gambled and lost."

After a continuance, the Petitioner filed numerous additional exhibits to his petition. He did not testify. He argued to the court that the psycho-sexual evaluation was a promise in the plea agreement that the State did not perform. He said the evaluation would determine the sentence length. He asked for his pleas to be vacated and to have a trial.

The trial court dismissed the petition after finding that the Petitioner did not prove that he received the ineffective assistance of counsel or that he entered his nolo contendere pleas unknowingly or involuntarily. In its order, the trial court stated that it had reviewed in the interest of justice all the materials submitted by the Petitioner, although the trial court found that many of these documents were irrelevant to the Petitioner's post-conviction relief claims.

I. INEFFECTIVE ASSISTANCE OF COUNSEL AND THE NATURE OF THE PLEAS

The Petitioner contends that the trial court erred in finding the Petitioner had not proven that he received the ineffective assistance of counsel and that his nolo contendere pleas were unknowingly and involuntarily entered. He cites as examples of the alleged ineffective assistance of counsel (1) the failure to have a psycho-sexual evaluation of the Petitioner performed, (2)

sentencing issues, including a “closed” sentencing hearing, (3) allegations of criminal conduct in Texas, (4) his confession, (5) indictment issues, and (6) plea hearing errors. The State initially claims that the Petitioner has waived his issues by (1) not complying with Tennessee Rule of Appellate Procedure 27(I) to submit an argument section of fifty pages or less and (2) failing to comply with this court’s order dated May 16, 2008, denying the Petitioner’s request to exceed the fifty-page limit for his argument as stated in Tennessee Rule of Appellate Procedure 27(I). Noting that the argument exceeds the page limitation by only one and one-quarter pages, in the interest of justice, we suspend the requirement limiting the argument section of the Petitioner’s brief to fifty pages. See T.R.A.P. 2. We address each of the Petitioner’s allegations in turn.

The burden in a post-conviction proceeding is on the Petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). On appeal, we are bound by the trial court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court’s conclusions as to whether counsel’s performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103 (2006).

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the Petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72 (1993). In other words, a showing that counsel’s performance falls below a reasonable standard is not enough; rather, the Petitioner must also show that but for the substandard performance, “the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. When a Petitioner pleads guilty, he must show a reasonable probability that, but for the errors of his counsel, he would not have pled guilty. See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Adkins v. State, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994).

A. Sex Offender Evaluation

In his brief, the Petitioner claims the trial court failed to take judicial notice of Tennessee Code Annotated section 39-13-705 (1997 & Supp. 1998) requiring that sex offenders submit to an evaluation for treatment, monitoring, and identification purposes. The Petitioner’s main argument is that trial counsel was ineffective for not having the evaluation performed. The Petitioner claims the evaluation would “help determine” the total length of the Petitioner’s two sentences ranging from eight years to twenty years. He alleges that “there is every reasonable probability that [the Petitioner’s] sentencing could have been different” if the evaluation had been performed. The State contends the Petitioner has failed (1) to show by clear and convincing evidence that he would not have entered the plea but for the promise of the evaluation and (2) to present proof of what this evaluation would have shown.

In its written order, the trial court made no findings regarding the lack of evaluation. However, the trial court accredited trial counsel's testimony in its findings. The evidence presented at the post-conviction hearing does not preponderate against the findings of the trial court accrediting trial counsel's version of events. Counsel testified that he thought he and the Petitioner waived the evaluation. Counsel stated that the paramount issue for the defense at the sentencing hearing had been the imposition of consecutive or concurrent sentences, not the length of the sentences as claimed by the Petitioner in his brief and documents presented to the court. We note the Petitioner failed to present testimony at the hearing to rebut his counsel's claim. Additionally, trial counsel stated that although the evaluation may have helped the Petitioner, it would have been irrelevant to the imposition of concurrent or consecutive sentences. He also testified that if the Petitioner had insisted upon the evaluation, then he would have moved to continue the sentencing hearing to accommodate his client's request. In view of the evidence, the Petitioner has failed to show that but for not receiving the evaluation, he would not have entered his pleas and that his counsel's failure to obtain the evaluation prejudiced the Petitioner because he would have obtained shorter sentences. The Petitioner is not entitled to relief.

B. Ineffective Assistance of Counsel: the Sentencing Hearing, Preliminary Hearing Counsel,
and Appellate Counsel
(the Petitioner's issues 1, 3, and 4)

The Petitioner contends that he was improperly prevented from raising sentencing issues to demonstrate instances of the ineffective assistance of counsel. He refers in his brief to sections in his amended petition for post-conviction relief where he alleges that (1) he was surprised to see witnesses for the State at the sentencing hearing because the trial court had told him there would be no witnesses, (2) trial counsel did not "effectively object" to the use of the Petitioner's confession at the sentencing hearing, (3) the Petitioner incriminated himself at the sentencing hearing by agreeing to the prosecutor's statements, but he was unaware that he was waiving his right against compelled self-incrimination, (4) he was unaware of the lifetime registration requirement, the one hundred percent service time, or that he faced consecutive sentences, and (5) he would not have accepted the plea offer had he known about the use of the confession, consecutive sentences, or the lifetime registration requirement. He also claims that because trial counsel did not tell him the hearing would be closed and did not move to reopen the hearing after the testimony, trial counsel was ineffective.

The State contends that because the Petitioner did not demonstrate the relevance of the sentencing hearing to his allegedly unknowing and involuntary pleas caused by the ineffective assistance of counsel, the trial court properly excluded this testimony. In response to the Petitioner's closed hearing claim, the State asserts that the trial court properly did not allow testimony on this issue because it was irrelevant to the Petitioner's claim of an involuntary and unknowing plea and that even if the Petitioner had proved deficiency and prejudice, he would only be entitled to a new sentencing hearing and not a new trial.

The Petitioner claims, as well, that he was improperly prevented from raising the issue of ineffective assistance for his preliminary hearing counsel because “the Grand Jury indicted on just one witness, who gave inadmissible evidence at the preliminary hearing” and that counsel was ineffective in not objecting to the evidence. The Petitioner claims that the witness, a law enforcement officer, testified regarding the statements of a child, which a Department of Children’s Services employee conveyed to him. Essentially, the Petitioner claims that but for preliminary hearing counsel’s deficient performance, his case would not have been bound over to the grand jury. The transcript reflects that the trial court told the Petitioner that this was not a cognizable claim for post-conviction relief. The State contends the trial court properly limited proof on this matter because the State could have sought an indictment if the charges had been dismissed at the preliminary hearing and because the Petitioner was subsequently indicted for the crimes.

Regarding the closed hearing allegation, the Petitioner has not demonstrated a ground for relief by clear and convincing evidence. He has not shown prejudice to his case from the exclusion from the hearing of all but the family and friends of the victim, essential court personnel, the Petitioner and the State, and the investigating officer for the testimony of the child. He has not shown that any alleged deficient performance by trial counsel at the sentencing hearing caused him to enter his two pleas on an earlier date. He is not entitled to relief.

For the other sentencing hearing claims, the record reflects that the trial court told the Petitioner repeatedly, after objections by the State that the only matter at issue was the entry of a knowing and involuntary plea and that “whatever happened at the sentencing is irrelevant and inadmissible,” that he could not raise allegations of ineffective counsel at his sentencing hearing regarding the use of the confession and that only evidence relevant to the issue of a knowing and voluntary plea would be presented. The Petitioner also said that he wanted to raise the ineffective assistance of appellate counsel by showing that appellate counsel did not present on appeal the use of the Petitioner’s confession at the sentencing hearing, although the Petitioner said trial counsel had objected to its use and that the Petitioner wanted this issue to be presented on appeal.

The record in the proceedings exceeds one thousand pages. The Petitioner’s brief and petitions do not weave facts into the argument. Instead, the brief and petitions require the court to follow the Petitioner’s cross-referencing to identify a concrete statement of the Petitioner’s claims and the facts pertaining to them. While the Petitioner did not organize the presentation of his record into a cogent argument, the record reflects that he presented the claims of ineffective assistance of trial counsel, specifically at the sentencing hearing, and of appellate counsel in his petition for post-conviction relief and amended petition. He also presented the claim of the ineffective assistance of preliminary hearing counsel. In view of the Petitioner’s claims, the trial court improperly limited the presentation of issues regarding the ineffective assistance of trial counsel, preliminary hearing counsel, and appellate counsel. See Bernard Henry v. State, No. W2007-00679-CCA-R3-PC, Shelby County, slip op. at 3 (Tenn. Crim. App. July 25, 2008) (holding that where a petitioner properly raised an ineffective assistance of appellate counsel claim in his petition but was precluded from raising it by the trial court, he was “entitled to have it considered by and determined by” the trial court in the hearing on the petition); Laraiel Winton v. State, No. E2006-02392-CCA-R3-PC, Knox

County, slip op. at 4 (Tenn. Crim. App. Aug. 29, 2007) (holding that although the petitioner had raised the ineffective assistance of trial counsel on direct appeal, the trial court improperly precluded the petitioner from raising ineffective assistance of appellate counsel as a ground for post-conviction relief and that he must be allowed to present evidence of trial counsel's deficient performance for the appellate counsel claim). The case must be remanded for a hearing on the issues of the ineffective assistance of trial counsel at the sentencing, other than allegations of a closed sentencing hearing, the ineffective assistance of preliminary hearing counsel, and the ineffective assistance of appellate counsel.

C. Potential Charges in Texas

The Petitioner claimed his counsel coerced him into entering his two nolo contendere pleas because trial counsel told him that he could be prosecuted for child rapes in Texas if he did not accept the plea offer. He also states that his attorney was ineffective in not interviewing the two victims but instead relying on their statements. The State responds that the Petitioner admitted the conduct at the plea hearing, that counsel testified that it was the Petitioner's decision whether to accept the plea, and that the Petitioner has not demonstrated he received the ineffective assistance of counsel.

The trial court stated that the Petitioner had not demonstrated either of the Strickland prongs. We agree. Entering a plea to avoid facing a greater number of charges at trial in Tennessee and to avoid being referred for prosecution in another state is a valid reason to accept a plea agreement. See Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (listing the "desire to avoid a greater penalty that might result from a jury trial" as one of the circumstantial factors used to determine whether a plea is knowing and voluntary). Trial counsel testified that not only was the Petitioner facing nine counts of aggravated sexual battery in Tennessee, the Petitioner potentially faced several counts of child rape in Texas, which trial counsel said used a jury for sentencing. The Petitioner made no showing of deficient performance or prejudice, both of which are required to argue ineffective assistance of counsel successfully. The Petitioner is not entitled to relief.

D. Involuntary Confession

The Petitioner claims in his brief that he would not have accepted the plea offer had he known the claimed coerced confession would be used as the basis for his plea. He insists that his attorney told him the statement would not be used against him if he accepted the plea agreement. The State contends the Petitioner has made no showing that the statement would have been suppressed had he proceeded to trial.

Although the trial court did not make findings of fact regarding the suppression of the Petitioner's confession, the record supports the trial court's determination that the Petitioner failed to show deficient performance and prejudice to his case. Although trial counsel testified that there was a strong basis upon which to suppress the Petitioner's statement, he also stated that the withdrawal of the suppression motion was a condition of the plea agreement, which allowed the

Petitioner to enter nolo contendere pleas to two of the nine charged offenses and not to be referred for prosecution in Texas. The evidence reflects that trial counsel told the Petitioner of an earlier plea offer and that the Petitioner seemed to hope, in spite of trial counsel's advice to the contrary and experience with the sentencing judge, that he would receive a sentence in the lower part of the range. The record reflects the Petitioner opted to accept the pleas and did not pursue the use of the confession during his direct appeal. Furthermore, trial counsel said that even if the confession had been excluded, the Petitioner would have been confronted at trial with the witnesses' testimony. The Petitioner has not shown that the result of the proceeding would have been different had trial counsel succeeded in preventing the confession from being used. He also has not shown a reasonable probability that but for the use of the confession, he would not have entered his pleas. He is not entitled to relief.

E. Indictment Issues

The Petitioner asserts that trial counsel was ineffective because he did not object to what the Petitioner claims is a multiplicitous indictment. The Petitioner states trial counsel's deficient performance prejudiced him in that he did not have a good understanding of the charges against him before entering his pleas. The State contends that the evidence does not support the Petitioner's claim.

Count 1 of the indictment reads as follows:

THE GRAND JURORS of Davidson County, Tennessee, duly impaneled and sworn, upon their oath, present that: WILLIAM L. VAUGHN on the 7th or 8th day of September, 2001, in Davidson County, Tennessee[,] and before the finding of this indictment, did intentionally engage in unlawful sexual contact with [A.V.], a child less than thirteen (13) years of age, in violation of Tennessee Code Annotated §39-13-504, and against the peace and dignity of the State of Tennessee.

Counts 2 through 9 allege the same offense and the same date, although the victim in these counts is L.O. Additionally, the counts list each victim's birthday next to the victim's name.

Although the trial court did not make specific factual findings regarding this issue, the evidence supports the trial court's conclusion that the Petitioner has not shown both deficient performance and prejudice. Trial counsel stated that he requested a bill of particulars and that he and the Petitioner received and reviewed the State's response before the Petitioner entered his pleas. Counsel stated additionally that each count of the indictment pertained to a different act. Contrary to the Petitioner's claim, trial counsel stated that the Petitioner had a good understanding of the charges against him. The Petitioner did not present evidence that would preponderate against the trial court's general accrediting of trial counsel's testimony over that of the Petitioner. Even if the Petitioner had shown that trial counsel's performance was deficient, he has not demonstrated

prejudice. He entered nolo contendere pleas to two counts instead of the nine counts with which he was charged and for which consecutive sentencing was available. He is not entitled to relief.

F. Plea Hearing

The Petitioner claims trial counsel was ineffective regarding his plea. He alleges that trial counsel did not tell him about the plea or the plea form and instead simply told him to initial the form's paragraphs. He states it was error for the trial court not to inform him of the lesser included offenses for which he could have been convicted had he elected to go to trial. He also says his attorney breached his duty of loyalty to him by discussing the case with another attorney, the employer of a State's witness and the eventual plaintiff's attorney in a civil suit against the Petitioner for his conduct. The State contends that the trial court properly found the Petitioner had not demonstrated deficient performance and prejudice, that the Petitioner had not demonstrated he would have gone to trial if he had been informed of the lesser included offenses, and that the Petitioner had not demonstrated the existence of a conflict of interest between his trial counsel and the Petitioner's case.

The trial court found that the Petitioner was aware of the consequences of the plea. The evidence does not preponderate against the trial court's finding. Trial counsel testified that he and the Petitioner discussed the plea agreement, the service time, and the benefits of the agreement. Counsel said the Petitioner said he had read the agreement. The evidence reflects that the Petitioner wrote his initials next to the paragraphs of the plea agreement. Counsel also testified that the Petitioner knew of the registry requirement, although he admitted that the trial court did not tell the Petitioner that it was a requirement for the duration of his life after his release and that neither he nor the trial court told the defendant about the lesser included offenses to aggravated sexual battery.

The trial court properly determined that the Petitioner had not shown deficient performance and prejudice regarding the Petitioner's knowledge of the consequences of plea. The Petitioner has not shown that but for a claimed deficient performance of counsel, he would not have entered his pleas. He is not entitled to relief.

The Petitioner has also not produced evidence of a conflict of interest or shown that knowledge of the lesser included offenses would have caused him to go to trial on nine counts of aggravated sexual battery. Trial counsel testified that he had spoken with the victims' mothers and that he thought one of the witnesses was particularly strong. He also said the Petitioner had admitted his conduct in a confession, which he tried to suppress. The Petitioner has not indicated which aspects of the testimony either at the sentencing hearing or at the plea hearing would lend credence to his claim that he did not commit the crime or would have been convicted of a lesser crime. The Petitioner is not entitled to relief.

The Petitioner has likewise not provided support for his claim that trial counsel discussed his case with the attorney employer of a State's witness who became the plaintiff's attorney in a suit seeking damages from the Petitioner for his conduct. He is not entitled to relief on this claim.

II. NARROWING OF THE ISSUES PRESENTED FOR POST-CONVICTION RELIEF (the Petitioner's issues 2, 5, 6, and 7)

The Petitioner claims that he suffered prejudice when the trial court did not allow him to raise all the issues and present all the testimony the pro se Petitioner wanted in the post-conviction hearing. Specifically, the Petitioner claims he was improperly prevented from presenting evidence regarding his preliminary hearing counsel and his appellate counsel. He claims that the trial court failed to rule on his "Motion and [Argument] For Use of All Issues Presented In Amended Petition and Affidavits." He also claims the trial court prevented him from testifying.

The State replies that the Petitioner has not demonstrated why the witnesses he requested were relevant to his claim of an involuntary and unknowing guilty plea, such that the Petitioner cannot show the trial court abused its discretion in holding that none of the subpoenaed witnesses were relevant to his claim. The State also asserts that in view of the Petitioner's admissions of guilt, trial counsel was not deficient in not interviewing the child victims, that the trial court stated that it gave all the Petitioner's documents due consideration, and that the trial court told the defendant that he could testify and did not prevent him from testifying.

We have already addressed the Petitioner's claims that the trial court improperly limited the scope of the hearing testimony. However, the evidence does not support the Petitioner's claim that he was denied his right to testify. The post-conviction hearing transcripts reflect that the pro se Petitioner chose not to testify and that the State expressed no need to cross-examine the Petitioner. The transcripts reveal the Petitioner tried to testify while questioning his former attorney. The trial judge instructed the Petitioner several times that he would have to testify to tell his side of the story. The Petitioner, after obtaining a continuance, opted not to testify. Instead, he submitted several hundred more pages to the record, pages which repeat the same claims as in the pro se petition and pro se amended petition. He is not entitled to relief on this ground.

Based on the foregoing and the record as a whole, we affirm in part and reverse in part the trial court's denial of relief. We remand the case for a hearing on the ineffective assistance of counsel issues that the trial court refused to consider as previously provided in this opinion.

JOSEPH M. TIPTON, PRESIDING JUDGE